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SUPREME COURT, U.S.

No. 06-990

In the Supreme Court of the United States

MICHAEL LEE HARMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding documentary evidence offered by petitioner.

2. Whether the district court abused its discretion in admitting the testimony of a government summary witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 442 F.3d 367.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2006. A petition for rehearing was denied on October 18, 2006 (Pet. App. 27a). The petition for a writ of certiorari was filed on January 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was an air traffic controller with the Federal Aviation Administration (FAA). Pet. App. 2a. On November 25, 1996, petitioner's chair malfunctioned, causing him to fall to the floor and injure his back. Gov't

C.A. Br. 4. Petitioner was taken to the hospital and released the same day. *Ibid.*

Unable to return to work, petitioner began receiving workers' compensation benefits from the United States Department of Labor (DOL). Pet. App. 2a. Petitioner briefly returned to work in April 1997, but the pain from his injury caused him to stop working a month later. He then resumed receiving workers' compensation benefits. Gov't C.A. Br. 4; see Pet. App. 2a.

From January 11, 1997, through February 23, 2002, when petitioner next returned to work as an air traffic controller, petitioner received $359,195.82 in benefits from the Office of Workers' Compensation Programs (OWCP) at the DOL. Gov't C.A. Br. 4. The OWCP monitors the status of all benefit recipients by requiring them periodically to fill out a questionnaire known as "Form 1032." Form 1032 requests information about a recipient's income, ability, and work-related activities. *Id.* at 4-5.

While petitioner received workers' compensation benefits, he worked for a variety of for-profit and charitable aviation organizations. He served as president and chief executive officer of Amber Aviation, Inc., a for-profit corporation. Pet. App. 3a. He also served on the board of directors for Challenge Air for Kids, a non-profit organization closely associated with Amber Aviation. *Ibid.* Additionally, petitioner flew planes for two charter airline companies, IFL Group and Hall Airways. *Ibid.* Petitioner failed to disclose any of those activities on the five Forms 1032 that he submitted to the OWCP while he received benefits. *Ibid.*; see Gov't C.A. Br. 5.

2. On June 17, 2003, a federal grand jury indicted petitioner on three counts of mail fraud, in violation of

18 U.S.C. 1341, and three counts of perjury for the purpose of obtaining workers' compensation benefits, in violation of 18 U.S.C. 1920. Those counts were based on the Forms 1032 that petitioner mailed to the Department of Labor in 1999, 2000, and 2001. Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on all six counts. He was sentenced to 33 months of imprisonment and ordered to pay $354,389.61 in restitution. Pet. App. 3a.

3. The court of appeals affirmed petitioner's convictions, vacated his sentence, and remanded for resentencing. Pet. App. 1a-26a. The court first rejected petitioner's argument that the misstatements in his Forms 1032 were immaterial (*id.* at 6a-8a), explaining that "a reasonable jury could find the omissions alleged by the indictment to be material." *Id.* at 8a. The court noted that the former president of Hall Airways testified that petitioner had asked him to donate what would have been his pay to Challenge Air and Amber Aviation. *Id.* at 9a. The court also noted that the president of IFL Group, another company for which petitioner flew planes, testified that he had given petitioner a "loan" in the amount of wages to which petitioner was entitled, which "loan" the president did not expect to be paid back. *Id.* at 10a. In rejecting petitioner's related challenge to the sufficiency of the evidence against him (*id.* at 8a-11a), the court of appeals, "drawing all reasonable inferences in favor of the Government," held that "a reasonable trier of fact could conclude that [petitioner] failed to disclose material information" to the DOL as "charged in the superseding indictment." *Id.* at 11a.

The court of appeals next addressed petitioner's claim that the district court had abused its discretion in

admitting (1) a chart setting forth the dates on which petitioner had received payments and submitted the forms to the DOL, and (2) the testimony of government witness Tom Hager, who summarized the evidence that had been presented in the case. Pet. App. 11a-13a. The court held that the district court did not abuse its discretion in admitting the chart or Hager's testimony, reasoning that "[t]he evidence at issue presented an appreciable degree of complexity," which warranted the summary, and the district court correctly "gave a limiting instruction to the jury." *Id.* at 13a.

Similarly, the court of appeals determined that the district court did not abuse its discretion in refusing to admit defense exhibits and limiting petitioner's cross-examination of government witnesses with respect to the extent of his injury, his attempt to return to work, and the knowledge of the FAA and DOL that he continued to pilot airplanes. Pet. App. 14a-16a. The court of appeals concluded that, "[e]ven if [petitioner's] evidence met the minimum threshold of relevancy, its exclusion was harmless because it could not have affected the jury's determination [on] any of the charged counts." *Id.* at 15a. The court of appeals stressed that the issue before the jury was "whether [petitioner] engaged in a scheme to defraud by concealing material information in the 1032 forms submitted to the DOL," not the nature or extent of petitioner's injury. *Ibid.* The court of appeals also noted that "[t]he trial court [had] permitted [petitioner] to testify both that he told his doctors about his flying and that he believed the doctors were forwarding that information to the DOL." *Id.* at 15a-16a. The court concluded that the excluded reports that gave rise to petitioner's evidentiary challenges were "to the same effect" as petitioner's testimony, and, accordingly, any

error in excluding the evidence was harmless. *Id.* at 16a.

In a single paragraph, the court of appeals dispensed with petitioner's objection to the statement, made by the prosecutor during closing argument, that there was no evidence that petitioner's back was broken. Pet. App. 16a. Reviewing for plain error, the court concluded that, although "the prosecutor's statement appears to have been neither warranted nor relevant," petitioner had not shown that the "comment on an essentially irrelevant matter substantially prejudiced his rights or resulted in a miscarriage of justice." *Ibid.*

Finally, the court of appeals rejected petitioner's claim that the district court erred in enhancing his sentence because of his obstruction of justice. Pet. App. 17a. The court noted that there was (1) testimony at trial indicating that petitioner had told a Challenge Air executive to destroy a relevant document and (2) a statement in the pre-sentence report (PSR) that petitioner had back-dated a check to make it appear that he was repaying a loan rather than receiving a salary. *Id.* at 17a-18a. Accordingly, the court held that the district court had not erred in enhancing the sentence. *Id.* at 18a. The court did, however, agree with petitioner that the district court had miscalculated, for sentencing purposes, the amount of loss he had caused. Accordingly, the court of appeals vacated the sentence and remanded for resentencing. See *id.* at 22a.

Chief Judge Jones dissented from the majority's decision to affirm petitioner's conviction, describing it as "a very close case." Pet. App. 22a-23a. Judge Jones believed that three of the district court's challenged rulings were erroneous, and that those rulings "turned the tide" for a prosecution in which "[a] rational jury could

have found reasonable doubt about the government's case." *Id.* at 23a. She also suggested that the district court's "trial errors" were "compounded" when the prosecutor "implied, in her closing rebuttal argument, that [petitioner's] disability was fake." *Ibid.* Judge Jones therefore would have vacated petitioner's conviction and remanded for a new trial. *Ibid.*

4. Petitioner filed a petition for rehearing en banc. On October 18, 2006, the court of appeals denied that petition, with only Judge Jones dissenting. Pet. App. 27a. On remand, the district court resentenced petitioner to "time served," plus three years of supervised release, and recalculated the amount of restitution petitioner owed under the Mandatory Victim Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, to $267,953.71. Amended Judgment 2-4.

ARGUMENT

Petitioner argues that this Court should review the court of appeals' decision because it (1) conflicts with decisions of this Court affirming a defendant's right to present a complete defense (Pet. 7-17), and (2) contravenes the Federal Rules of Evidence (Pet. 17-21). Petitioner's claims lack merit.

1. Petitioner first contends (Pet. 7-17) that the cumulative effect of the district court's adverse evidentiary rulings was to deprive him of his right "to present a complete defense" (Pet. 7), in contravention of this Court's decisions in *Holmes* v. *South Carolina*, 126 S. Ct. 1727 (2006); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); and *Washington* v. *Texas*, 388 U.S. 14 (1967). See Pet. 7-12. Petitioner is mistaken.

a. As this Court recently reaffirmed in *Holmes*, "[s]tate and federal rulemakers have broad latitude un-

der the Constitution to establish rules excluding evidence from criminal trials." 126 S. Ct. at 1731 (quoting *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998)). "The Constitution permits judges 'to exclude evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues.'" *Id.* at 1732 (quoting *Crane* v. *Kentucky*, 476 U.S. 683, 689-690 (1986)) (some internal quotation marks omitted).

The court of appeals in this case correctly held that the district court exercised its discretion within constitutional bounds when it excluded evidence that was, at most, marginally relevant and was merely repetitive of the testimony offered by petitioner and other witnesses at trial. See Pet. App. 15a (explaining that "[t]he jury was not required to determine whether [petitioner] actually suffered an injury or the extent of that injury" and that, even if the FAA knew about petitioner's flying activities, that knowledge would not be imputed to the DOL), 15a-16a (noting that petitioner was allowed to testify that he told his doctors he was flying and that he believed the information was being forwarded to the DOL); Gov't C.A. Br. 32 (third party testified to petitioner's "serious" injury), 33 n.4 (FAA employee testified that petitioner told the FAA he was mentally and physically ready to return to work), 35 n.5 (testimony of FAA employee indicated that both the FAA and DOL knew about petitioner's flying); Pet. 6 (acknowledging that petitioner testified about his injury, efforts to return to work, and agency knowledge that he was flying aircraft), 8 (stating that proffered documentary evidence would have "corroborated petitioner's trial testimony").

b. The cases cited by petitioner are not to the contrary. *Holmes* and *Washington* both involved challenges to State rules that arbitrarily excluded an entire category of relevant evidence. See *Holmes*, 126 S. Ct. at 1735 (holding unconstitutional rule that conditioned admission of evidence of third-party guilt on strength of State's case because "no logical conclusion c[ould] be reached regarding the strength" of the evidence of third-party guilt "by evaluating the strength of [the State's] * * * contrary evidence"); *Washington*, 388 U.S. at 22 (holding unconstitutional a state statute prohibiting defendants from calling as witnesses individuals who had been charged as principals, accomplices, or accessories in the same crime as the defendant because the rule irrationally "presume[d] * * * unworthy of belief" the potentially probative testimony of "whole categories of defense witnesses"). *Chambers* similarly involved a rule against hearsay applied "mechanistically," without an exception for declarations against penal interest, in combination with a common-law rule that prevented the defendant from impeaching his own witness. 410 U.S. at 300-301, 302; see *Scheffer*, 523 U.S. at 316 (recognizing that *Chambers* "specifically confined its holding to the 'facts and circumstances' presented in that case").

In contrast to the cases cited by petitioner, the district court here made case-specific evidentiary rulings after weighing the relevance of petitioner's proffered evidence against its potential for prejudice. Such routine evidentiary determinations, even if incorrect, are not of constitutional magnitude so long as the defendant has a meaningful opportunity to present his defense in

a fundamentally fair trial.[1] As the court of appeals held, the district court did not abuse its discretion in excluding evidence that "could not have affected the jury's determination" with respect to "any of the charged counts." Pet. App. 15a; see *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988) (A criminal defendant "does not have an unfettered right to offer testimony that is * * * inadmissible under standard rules of evidence."). And, as noted above, petitioner admits that he was allowed to testify to the matters contained in the documents he sought to admit, and that testimony was echoed by other witnesses at trial.

Petitioner thus is right to characterize his constitutional challenge as presenting "a narrow question" (Pet. App. 8 (emphasis removed)). Such a claim does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. Petitioner next contends (Pet. 17-21) that the district court erred in permitting the government to introduce the testimony of a witness who summarized the documentary evidence that had been presented at trial. Petitioner insists that it was difficult for his counsel "meaningfully to cross examine a witness with no personal knowledge concerning the events he [was] called

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[1] Indeed, the dissenting opinion in the court of appeals characterized the district court's evidentiary rulings as "trial errors" (Pet. App. 23a), not errors of constitutional dimension.

upon to relate to the jury." Pet. 17. These claims lack merit.

Like other circuits,[2] the Fifth Circuit allows the use of summary witnesses in appropriate cases. See *United States* v. *Fullwood*, 342 F.3d 409, 414 (2003) (holding that admission of summary witness testimony did not constitute reversible plain error and citing cases in which such testimony had been admitted), cert. denied, 540 U.S. 1111 (2004). "[S]ummary [testimony] serves an important purpose" in complex cases by presenting in comprehensible form the information in "voluminous records" presented to the jury. *Fullwood*, 342 F.3d at 413-414. As the court of appeals explained in this case, the evidence of petitioner's fraud "presented an appreciable degree of complexity" that made the use of a summary witness appropriate, and the district court properly "gave a limiting instruction to the jury" as required by circuit precedent. Pet. App. 13a;[3] see *United States* v. *Bishop*, 264 F.3d 535, 547 (5th Cir. 2001) (stating that summary testimony "should be accompanied by a cautionary jury instruction"), cert. denied, 535 U.S. 1016 (2002).

Petitioner does not suggest that the Fifth Circuit's practices with respect to the admission of summary-witness testimony are in conflict with those of any other circuit. Nor does petitioner explain why he could not meaningfully cross-examine the summary witness in an effort to show that the witness lacked personal knowledge of the matters about which he testified or

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[2] See, *e.g.*, *United States* v. *Swanquist*, 161 F.3d 1064, 1073 (7th Cir. 1998), cert. denied, 526 U.S. 1160 (1999); *United States* v. *Lemire*, 720 F.2d 1327, 1346-1350 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

[3] The dissent did not question the majority's analysis of petitioner's challenge to the summary witness. See Pet. App. 22a-23a.

that his summary was incorrect. See *United States* v. *Swanquist*, 161 F.3d 1064, 1073-1074 (7th Cir. 1998) (rejecting defendant's claim that he was unconstitutionally limited in cross-examining summary witness where defendant "had the opportunity to cross-examine [the summary witness] within the scope of his direct testimony" and was simply "frustrat[ed] with his inability to extract helpful testimony from an adverse witness"), cert. denied, 526 U.S. 1160 (1999).

In any event, petitioner failed to raise in either the district court or the court of appeals a constitutional ground for his challenge to the introduction of summary testimony. See Pet'r C.A. Br. 41-47; Pet'r C.A. Reply Br. 16-20; Pet'r C.A. Pet. Reh'g 10-12. This Court does not ordinarily review claims raised for the first time in a petition for certiorari, see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), and there is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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